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## CHOICE OF LAW IN MICHIGAN: A TIME TO GO MODERN

ROBERT ALLEN SEDLER†

*To everything there is a season, and a time to every purpose under the heaven*

. . . . .

*A time to get, and a time to lose; a time to keep, and a time to cast away.<sup>1</sup>*

### I. INTRODUCTION: A TIME TO KEEP

It is unfortunate that the first case to present squarely the question of whether Michigan should abandon its traditional approach to choice of law was *Abendschein v. Farrell*,<sup>2</sup> decided in 1969. *Abendschein* was a seemingly complex case, as conflicts cases go; the accident victim was a resident of New York, the defendant was a resident of Michigan, and the accident occurred in Ontario. Moreover, New York had no guest statute and the guest statutes of Michigan and Ontario differed. The Michigan guest statute,<sup>3</sup> which has since been declared unconstitutional,<sup>4</sup> barred recovery by a guest passenger against the host driver unless gross negligence or wilful and wanton misconduct could be shown, while the Ontario guest statute in force at the time of the accident<sup>5</sup> barred recovery completely. In *Abendschein*, however, since the complaint alleged that the driver was intoxicated, recovery would have been allowed under the Michigan guest statute as well as under New York law. The case was further complicated by the fact that the accident occurred on a trip from Buffalo, New

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1. *Ecclesiastes* 3:1, 8.

2. 382 Mich. 510, 170 N.W.2d 137 (1969).

3. MICH. COMP. LAWS ANN. § 257.401 (1977).

4. *Manistee Bank & Trust Co. v. McGowan*, 394 Mich. 655, 232 N.W.2d 636 (1975).

5. The statute was amended, effective Jan. 1, 1967, to allow recovery for gross negligence. ONT. REV. STAT. ch. 172, § 105(2) (1960), as amended by, ONT. REV. STAT. ch. 64, § 20(2) (1964).

York, to Detroit, Michigan—between which the most direct route led across Ontario<sup>6</sup>—and that the plaintiff encouraged the court to adopt the “dominant contacts” approach of the Restatement (Second) of Conflict of Laws. Under that approach the choice of law decision turns on the factual contacts that the transaction had with the involved states.<sup>7</sup> Given the particular factual situation *Abendschein* presented, however, it was not at all clear which state had the “dominant contacts” on the issue of host-guest immunity. The case might have appeared less complex to the court and the solution more apparent if the plaintiff had urged the adoption of what may be referred to as the policy-centered approach to choice of law, under which the choice of law decision is based on considerations of policy and fairness to the parties.<sup>8</sup> Forced to confront all of these factors, however, the Michigan supreme court was not persuaded that the time had come to abandon the traditional approach, since, as it observed, “the quagmire of unanswered and perceivably unanswerable questions arising out of the proposed new doctrine appears less attractive than our admittedly hard and fast—and occasionally unjust, it is true—rule that the law of the place of the wrong is applied when the forum is a Michigan court.”<sup>9</sup>

A different result might have obtained if the case had presented the same factual situation and the same fact-law pattern<sup>10</sup> as was presented in an earlier case, *Kaiser v. North*,<sup>11</sup>

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6. When I was doing the preliminary research for this article, I was residing in Ithaca, New York, and had accepted an appointment at Wayne State, beginning in the fall of 1977. I knew that I would be making at least two trips to Detroit, one of them with my family, and would be taking the Ontario route. Reading *Abendschein* and the other cases involving accidents along that route was not exactly reassuring.

7. The reference to “dominant contacts” is, of course, to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS’ concept of the state of the most significant relationship. As to the approach of the RESTATEMENT (SECOND), see generally Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 689 (1963).

8. As to the meaning of the policy-centered approach to choice of law, see Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27, 57-61 (1967).

9. 382 Mich. at 516, 170 N.W.2d at 139. For a criticism of the reasons that the court advanced, see Shuman, *Conflict of Laws, 1969 Ann. Survey of Mich. Law*, 16 WAYNE L. REV. 535, 554 (1970). Professor Shuman states: “It is hard to conceive of a more circular, amphibolic, elenctic, and fatuous statement to support retention of the *lex loci* rule.” *Id.*

10. As to the fact-law pattern in conflicts torts cases, see notes 106-08 & accompanying text *infra*.

11. 292 Mich. 49, 289 N.W. 325 (1939).

decided in 1939. That case firmly established the place of the wrong rule of the traditional approach as the law in Michigan. There the guest passenger and the host driver were both residents of Michigan, where the trip originated, and presumably where the parties were to return at the trip's conclusion, but the accident occurred in Ontario. The plaintiff alleged gross negligence, which would have entitled him to recovery under Michigan law, and the defendant asserted the Ontario guest statute as a complete bar to the suit. The court held, as did all other courts at that time, that the law of the place where the accident occurred governed, and, consequently, applied Ontario law to deny recovery. In virtually all of the cases where this same fact pattern was presented—two forum residents involved in an accident in another state, the law of which differed from the law of the forum on the point in issue—a clear majority of courts<sup>12</sup> in recent years have chosen to abandon the place of the wrong rule and with it the traditional approach to choice of law.<sup>13</sup>

The kind of situation described above reveals most starkly the unsoundness of the place of the wrong rule. If the law of the forum allows recovery, the case presents a false conflict in terms of interest analysis.<sup>14</sup> For example, the forum has a real interest in applying its law to allow recovery, since the social and economic consequences of the accident will be felt by the victim in that state, while the state of injury has no interest in applying its law to deny recovery, since the consequences of imposing liability on the defendant and the insurer will not be felt in that state.<sup>15</sup> Conversely, if the law of the forum does not allow recovery, it likewise has a real interest in applying its law to protect its resident defendant and insurer, and is not disposed toward subordinating that interest to any possible interest of the state of injury in allowing recovery to a non-resident plaintiff injured in that state.<sup>16</sup> The uniform practice

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12. Among the 50 states and the District of Columbia, the breakdown is as follows: abandoned the place of the wrong rule—27; adhered to the place of the wrong rule—18; have not yet passed on the question—6. See the discussion and listing of cases in Sedler, *Rules of Choice-of-Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 n.2 (1977).

13. Beginning, of course, with *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

14. For a discussion of the interest analysis approach, see generally Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 186-88 (1977).

15. See Sedler, *supra* note 14, at 186-87.

16. See *id.*

of the courts that have abandoned the traditional approach when presented with this situation is reflected in what can be termed a rule of choice of law:<sup>17</sup> when two residents of the forum are involved in an accident in another state, the law of the forum applies.<sup>18</sup> Thus, if a modern version of *Kaiser v. North* had been presented to the Michigan supreme court in 1969 instead of *Abendschein v. Farrell*, Michigan too might have chosen to go modern by abandoning the traditional approach to choice of law. Michigan, however, chose to stay with the decreasing number of American courts that cling to the traditional approach.<sup>19</sup>

The Michigan supreme court has not decided any cases directly involving choice of law since *Abendschein*, but much has happened in Michigan and elsewhere since that case was decided. These developments should persuade the Michigan supreme court to abandon the place of the wrong rule and the traditional approach to choice of law that it embodies. It is now time for Michigan to embrace the policy-centered approach to choice of law, with its emphasis on considerations of policy and fairness to the parties and on the real interests of the involved states. Accordingly, this article will first discuss the experience of the courts that have abandoned the place of the wrong rule and have applied a policy-centered approach to choice of law. It will then discuss choice of law in Michigan and how the place of the wrong rule has been applied—or misapplied—in practice under the strictures of *Abendschein*, as well as the way in which choice of law would have operated in Michigan in the years following *Abendschein* if the court had adopted the policy-centered approach. It will conclude with a discussion of the constitutional question that is raised by continued adherence to the place of the wrong rule in Michigan.

## II. THE EXPERIENCE ELSEWHERE: THE OPERATION OF THE POLICY-CENTERED CONFLICT OF LAWS

Some have said that in regard to choice of law, "there exists extreme disagreement among both judges and commen-

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17. See generally Sedler, *supra* note 12.

18. *Id.* 1033.

19. Massachusetts is the latest state to abandon the traditional approach. *Pevoski v. Pevoski*, \_\_\_\_ Mass. \_\_\_\_, 358 N.E.2d 416 (1976).

tators not simply over the details of choice of law policy, but over the most fundamental principles of the subject.”<sup>20</sup> While academic commentators have long agreed that the traditional approach should be abandoned, they have sharply disagreed over what approach should be adopted in its stead. The same disagreement was reflected in judicial decisions when *Abendschein* was decided. As in *Abendschein*, lawyers arguing for the abandonment of the traditional approach tended to urge replacement by the “state of the most significant relationship” approach of the Restatement (Second) of Conflict of Laws; this approach had been explicitly adopted by a number of courts at that time.<sup>21</sup> The most influential academic approach, however, appeared to be Currie’s interest analysis, which based the choice of law decision on the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue.<sup>22</sup> Some courts expressly followed Currie’s approach;<sup>23</sup> some followed Leflar’s approach of choice-influencing considerations.<sup>24</sup> Some were more eclectic, looking to different approaches which would support the particular result they desired to reach.<sup>25</sup> All in all, the concern over the “quagmire of unanswered and perceivably unanswerable questions” that the Michigan supreme court expressed in *Abendschein* was not wholly unrealistic, and was shared by other

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20. R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 7 (2d ed. 1975).

21. See, e.g., *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Fabricius v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Casey v. Manson Constr. Co.*, 247 Or. 274, 428 P.2d 898 (1967); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964).

22. Currie’s major articles have been collected in a book, B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

23. See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Melk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). New York’s adherence to interest analysis was sharply curtailed in favor of “narrow, policy-based rules” in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

24. See, e.g., *Clark v. Clark*, 107 N.H. 351, 222 A.2d 305 (1966); *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, cert. dismissed, 393 U.S. 957 (1968); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). As to Leflar’s approach see generally Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); *Conflicts Laws: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

25. See, e.g., *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966).

courts that likewise refused to abandon the traditional approach.<sup>26</sup>

Today, however, while the debate among academicians over the preferred approach to choice of law remains unabated,<sup>27</sup> the same generally is not true with respect to the courts.<sup>28</sup> They have resolved the choice of law questions in the cases that have arisen on the basis of considerations of policy and fairness to the parties and with reference to the fact-law pattern presented in each particular case.<sup>29</sup> In practice, regardless of the specific approach or methodology that the courts purportedly apply, they have emphasized the policies and interests of the involved states,<sup>30</sup> and have applied their own law whenever they have seen a real interest in doing so, so long as this would not be fundamentally unfair to the other party.<sup>31</sup>

The practice of the courts in torts cases can be related to the development of rules of choice of law.<sup>32</sup> These rules of choice of law are based on the results reached by the courts in the cases coming before them without regard to the specific approach or methodology that they purportedly applied.<sup>33</sup> The most "universal" rule, followed by all of the courts that have abandoned the traditional approach, is that when two residents of the forum are involved in an accident in another state, the law of the forum applies.<sup>34</sup> Another rule of choice of

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26. See, *Friday v. Smoot*, 58 Del. 488, 493, 211 A.2d 594, 597 (1965); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743, 749-52 (Fla. 1967); *Winters v. Maxey*, 481 S.W.2d 755, 758 (Tenn. 1972).

27. It is difficult to categorize the conflicting approaches. The adherents of interest analysis disagree among themselves over Currie's insistence that the forum should always apply its own law whenever it has a real interest in doing so. Leflar's choice-influencing considerations must be seen as another approach, as, of course, must the RESTATEMENT (SECOND). Among some commentators there has been renewed emphasis on territorialism, removed, however, from the territorially-based rules of the traditional approach. There has also been some movement in the direction of narrow, policy-based rules. For a discussion of the differing approaches see generally Sedler, *supra* note 14.

28. Although the courts purportedly follow different approaches, it is my submission that on the whole they make the choice of law decision with reference to the policies and interests of the involved states and considerations of fairness to the parties. See Sedler, *supra* note 14, at 232-33.

29. This is what I refer to as judicial method and the policy-centered conflict of laws. See note 8, *supra*.

30. See Sedler, *supra* note 14, at 232-33.

31. See *id.*

32. Sedler, *Rules of Choice-of-Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977).

33. See *id.* 1032.

34. *Id.* 1033.

law is that when two parties from a recovery state, without regard to forum residence, are involved in an accident in a non-recovery state, recovery is allowed.<sup>35</sup> There are some other situations in which the courts are divided; but these divisions can be stated in terms of majority and minority views. For example, the courts divide when two parties from a non-recovery state are involved in an accident in a recovery state and suit is brought in the recovery state. The majority view finds that the forum should apply its own law allowing recovery.<sup>36</sup> Similarly, there have been a number of cases in which a recovery state plaintiff is injured by a non-recovery state defendant in the defendant's home state, and for one reason or another, suit can be brought in the plaintiff's home state.<sup>37</sup> Here the majority of courts have held that the forum should apply its own law allowing recovery, assuming that this produces no unfairness to the defendant.<sup>38</sup>

In making the choice of law decision then the courts have emphasized the policies and interests of the involved states. In order to assist courts in the process of deciding actual cases, then, a reformulation of Currie's interest analysis methodology was recently undertaken by this writer.<sup>39</sup> This reformulation focuses on the real interests of the forum and of the other involved state or states<sup>40</sup> and establishes three interest situations and solutions. First, when the forum has a real interest in applying its own law on the point in issue,<sup>41</sup> it should do so, assuming that this will not be fundamentally unfair to the other party.<sup>42</sup> Second, when the forum does not have a real interest in applying its law on the point in issue, but another state has such an interest,<sup>43</sup> it should apply the law of the

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35. *Id.* 1034.

36. *Id.* 1035.

37. As to the exercise of jurisdiction by the courts of the plaintiff's home state in these circumstances, see *id.* 1037.

38. *Id.* 1036. When suit is brought in the defendant's home state, that state will apply its own law, denying recovery. *Id.* 1037.

39. Sedler, *supra* note 14, at 220.

40. As to the meaning of real interests see *id.* 222-21. Most cases involve the two state situation, but the analysis is equally applicable when a third state is involved.

41. This covers what Currie calls the false conflict, when the forum is the only interested state, and the true conflict, when the forum and another state both have a real interest in applying their law on the point in issue.

42. See Sedler, *supra* note 14, at 221, 227.

43. This covers what Currie calls the false conflict when the forum is not the state interested in applying its own law.



other state, again assuming no fundamental unfairness.<sup>44</sup> Third, when neither state has a real interest in applying its law on the point in issue,<sup>45</sup> the choice of law decision should be made with reference to the common policies reflected in the laws of the involved states.<sup>46</sup> These solutions are to a substantial extent reflected in the tort rules of choice of law discussed above.<sup>47</sup> Experience has also demonstrated that ordinarily it is not difficult to identify the policies reflected in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue.<sup>48</sup> Similarly, experience has shown that in practically every accident situation no unfairness will result from the application of the forum's own law or the law of the other involved state.<sup>49</sup> In short, in the years since *Abendschein* was decided, it has become abundantly clear that a policy-centered approach to choice of law does not produce a "quagmire of unanswered and perceivably unanswerable questions."

To the contrary, if *Abendschein* were to arise today, a court committed to a policy-centered approach could resolve it fairly easily. Since the plaintiff alleged and apparently could prove that the defendant was guilty of gross negligence, there was no conflict between the law of Michigan and the law of New York on the issue of the guest passenger's right to recover against the host driver. In the circumstances of that case, then, both Michigan and New York had a policy of protecting plaintiffs. Further, New York had a real interest in applying its law to implement that policy, since the plaintiff was a resident of New York and the social and economic consequences of the accident would be felt by the plaintiff in that state. Ontario had a policy of protecting defendants and insurers, but it had no interest in applying that policy in *Abendschein*, since the defendant was a resident of Michigan, and the conse-

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44. See Sedler, *supra* note 14, at 221-22.

45. This covers what Currie calls the unprovided for case.

46. See Sedler, *supra* note 14, at 235.

47. Courts may sometimes disagree over whether or not a state has a real interest in applying its own law on the point in issue, such as whether the state where an accident occurs has a real interest in applying its law allowing recovery in favor of a non-resident injured there. This disagreement may be reflected in a majority and minority view on the rule of choice of law. See Sedler, *supra* note 32, at 1032.

48. See Sedler, *supra* note 14, at 203.

49. See *id.* 227.

quences of imposing liability would be felt by the defendant and the insurer in that state. In terms of interest analysis, then, *Abendschein* presented a false conflict, since only New York had a real interest in applying its law on the point in issue.

In addition, *Abendschein* clearly highlights the way in which the rules of the traditional approach can produce irrational and unsound—and what the court there referred to as “occasionally unjust”—results. The application of Ontario law on the issue of guest-host immunity advanced no interest of Ontario, while it defeated New York’s real interest in applying its law on that issue.<sup>50</sup> Nor should the fact that plaintiff and defendant were from different recovery states have obscured the point that a false conflict was presented. After all, the identical situation was presented in a case decided prior to *Abendschein*, *Reich v. Purcell*.<sup>51</sup> The Michigan Court of Appeals discussed *Reich* when *Abendschein* was before it,<sup>52</sup> but, interestingly, the Michigan supreme court did not. In *Reich*, the victim was a resident of Ohio at the time of the fatal accident, which occurred in Missouri, and the defendant was a resident of California.<sup>53</sup> Only Missouri law limited the amount recoverable. The California supreme court applied the law of Ohio as the law of the only interested state. That same result, the one reached by other courts presented with that same fact pattern,<sup>54</sup> is embodied in the rule of choice of law that when two parties from a recovery state are involved in an accident in a non-recovery state, recovery is allowed.<sup>55</sup> It also illustrates the second interest solution in the reformulation of Currie’s interest analysis: when the forum does not have a real interest in applying its law on the point in issue, but another state has such an interest, the forum should apply the law of the other

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50. The application of the law of the place of injury under the traditional approach frequently means that in the case of what Currie calls the false conflict the law of the state which has no interest will be applied in preference to the law of the only interested state. See B. CURRIE, *supra* note 22, at 163-64.

51. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

52. 11 Mich. App. 662, 674-75, 162 N.W.2d 165, 170-71, *aff’d*, 382 Mich. 510, 170 N.W.2d 39 (1969).

53. Ironically, the victim was on his way to California, and after the accident his beneficiaries settled there.

54. See *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 253 A.2d 129 (1970). Cf., *Myers v. Cessna Aircraft Corp.*, 275 Or. 501, 553 P.2d 355 (1976) (false conflict situation involving statute of limitations in wrongful death actions).

55. Sedler, *supra* note 32, at 1034.

state.<sup>56</sup> Thus, the "occasionally unjust" results reached under the traditional approach in this situation are avoided by courts that adhere to the principles of the policy-centered approach.

Moreover, in a more complicated situation, the policy-centered approach similarly facilitates sound decision-making. For example, suppose that *Abendschein* were the more typical guest-host immunity case in which only ordinary negligence was alleged. Here Michigan would have a real interest in applying its law to deny recovery, since the consequences of imposing liability against the defendant and the insurer would be felt in Michigan.<sup>57</sup> New York would also have a real interest in applying its law to allow recovery to the New York accident victim. Thus, a true conflict would have been presented, as is always the case when the plaintiff is from a recovery state and the defendant is from a non-recovery state.<sup>58</sup> Under the policy-centered approach in these circumstances, regardless of whether the accident had any factual contacts with Michigan, Michigan should have applied its own law.<sup>59</sup> Even in the absence of any factual contacts with the transaction, it is well settled that a state constitutionally may apply its own law when it has a real interest in doing so and the application of its law is not fundamentally unfair to the other party.<sup>60</sup> Since accidents are not planned, the application of a particular state's law in an accident case would rarely result in such unfairness.<sup>61</sup> Again, an applicable rule of choice of law tailored

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56. Sedler, *supra* note 14, at 221-27.

57. See Sedler, *supra* note 14, at 200 n.16. For insurance purposes, accidents are charged against the loss experience of the place where the vehicle is garaged and registered irrespective of where the accident occurs. See generally Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 567-69 (1961).

58. See Sedler, *supra* note 14, at 228. The interests of the parties' home states are the same irrespective of where the accident occurred.

59. Judge Gillis, writing for the majority when *Abendschein* was before the Court of Appeals, questioned whether Michigan constitutionally could apply its own law because of its lack of factual contacts with the accident. 11 Mich. App. at 679, 162 N.W.2d at 173. Judge (now Justice) Levin, on the other hand, indicated that it would not necessarily be improper to apply Michigan law, although he expressed doubts that the Michigan guest statute was intended to apply to accidents occurring in another state. 11 Mich. App. at 686-92, 162 N.W.2d at 177-80.

60. See Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 402-04 (1971).

61. In the accident situation, unfairness can result in two circumstances: when a party could not have foreseen being held liable for the accident in question and, therefore, could not have been expected to insure against such liability or when the party may have conformed its conduct to the requirements of the law of a particular state and, therefore, could not have expected that different requirements would apply. See Sedler, *supra* note 14, at 229-30.

to these circumstances has developed under a policy-centered approach: when a recovery state plaintiff is injured by a non-recovery state defendant, and suit is brought in the defendant's home state, that state will apply its law, denying recovery, irrespective of where the accident occurred.<sup>62</sup> This rule of choice of law also illustrates the first interest solution of the reformulation of Currie's interest analysis: when the forum has a real interest in applying its own law on the point in issue, it should do so, assuming that this will not be fundamentally unfair to the other party.

From the perspective of hindsight then, *Abendschein* was not a difficult case; nor would it have been more difficult had Michigan law denied recovery. The courts that have abandoned the place of the wrong rule in favor of a policy-centered approach have not been bogged down in a "quagmire of unanswered and perceivably unanswerable questions." They have reached fairly uniform results in the cases that have been presented to them for decision, which can be incorporated into rules of choice of law. There is much that Michigan can learn from their experience.

### III. THE EXPERIENCE IN MICHIGAN: THE PLACE OF THE WRONG RULE AND "MANIPULATIVE TECHNIQUES"

When the Michigan supreme court in *Abendschein* opted for the "admittedly hard and fast rule of the place of the wrong,"<sup>63</sup> it presumably hoped to obtain the advantages of certainty, predictability and ease of application that the rules of the traditional approach were designed to achieve.<sup>64</sup> If this was its hope, the experience in Michigan in the years since *Abendschein* was decided indicates that the court should be greatly disappointed. *The place of the wrong rule simply has not been followed consistently by the Michigan Court of Appeals and by the federal courts in Michigan called upon to apply Michigan conflicts law in diversity cases.* These courts have not hesitated to employ all of the classic "escape devices" and

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62. See Sedler, *supra* note 32, at 1037.

63. 385 Mich. at 516, 170 N.W.2d at 139.

64. As has been noted: "Traditional choice-of-law thinking . . . rests upon the assumption that choice-of-law rules, simple in form and capable of easy administration, should promote uniformity of result, enhance predictability, and discourage forum-shopping." R. CRAMTON, D. CURRIE & H. KAY, *supra* note 20, at 13.

"manipulative techniques" in order to avoid the operation of the place of the wrong rule and to bring about the application of Michigan law.<sup>65</sup> In practice, the place of the wrong rule has been honored more in the breach than in the observance. In addition, there sometimes has been disagreement between particular panels of the court of appeals and between the court of appeals and the federal courts over the employment of "manipulative techniques," so that it is not even possible to predict whether the place of the wrong rule will be followed or evaded. The decision in *Adendschein*, then, produced the worst of both worlds; Michigan eschewed considerations of policy and fairness and the advancement of its own real interests in return for a choice of law that in practice is marked by uncertainty and unpredictability.

As the court recognized in *Abendschein*, the application of the "hard and fast rule of the place of the wrong" will produce an "occasionally unjust" result.<sup>66</sup> This indeed is an understatement; when forum residents are involved in an accident in another state, the displacement of the forum's own law and the sacrifice of its real interests is clearly an unsound—and in this sense "unjust"—result. Consequently, when all courts followed the traditional approach to choice of law, they frequently employed "manipulative techniques" precisely in order to escape such a result. Although the courts purportedly applied the rules of the traditional approach, they would deliberately "manipulate" them in such a way as to effectuate the application of their own state's substantive law and the implementation of the policy embodied in that law. The "manipulative technique" was used only for the particular case; when a similar case arose in which the court was not willing to "manipulate the system," it would repudiate its prior "departure" and return to the "correct" application of the rules.<sup>67</sup>

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65. See generally Sedler, *supra* note 8, at 48-53.

66. 382 Mich. at 516, 170 N.W.2d at 139.

67. For example, in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), the New York court of appeals held that limitations on the amount recoverable for wrongful death went to the matter of "remedy," so as to make it "procedure" for conflicts purposes and determined by the law of the forum. This enabled it to apply New York law allowing unlimited recovery for wrongful death in favor of the beneficiaries of a New York victim killed in an airplane crash in Massachusetts, the law of which limited damages recoverable for wrongful death to \$15,000. The next year, however, when it was contended that New York law, as the law of the forum, should determine entitle-

Two of the most effective "manipulative techniques" were those of "public policy" and "procedural characterization." Under the traditional approach, the forum, on grounds of "public policy," could refuse to enforce a claim existing under the law of the state whose law governed when it found the nature of the claim "shocking." This exception was to be used very sparingly; it was to be a fairly rare circumstance where a claim existing under the law of another state would be considered "shocking."<sup>68</sup> Furthermore, a dismissal on "public policy" grounds presumably was not a dismissal on the merits and the plaintiff was free to sue in another state whose statute of limitations had not yet run. For this reason, "public policy" could never be used to defeat a defense existing under the law of the state whose substantive law the forum was applying, since the effect of refusing to allow the defense would be to render a judgment for the plaintiff.<sup>69</sup> Also, under the traditional approach, the law of the forum was to govern on all matters of "procedure."<sup>70</sup> In order to bring about the effective application of their own substantive law, however, courts following the traditional approach could and frequently did manipulate these principles. They would hold that it was against their "public policy" to enforce a claim existing under the law of the state whose law governed, even though that claim was not "shocking" under the proper test of "public policy," and similarly would apply "public policy" to defeat a defense existing under the law of the state that they were applying, even though that enabled the plaintiff to prevail.<sup>71</sup> They would also characterize the issue in question as "procedural," even though it was analytically "substantive," and

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ment to pre-judgment interest, the court repudiated the "procedure" rationale of *Kilberg* and held that the matter was one of "substance" for conflicts purposes. *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

68. The "classic" test, as stated by Judge Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918), was that enforcement of the claim would have to "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

69.

A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another state . . . subjects the defendant to irremediable liability. This may not be done.

*Bradford Electric Co. v. Clapper*, 286 U.S. 145, 160 (1932) (Brandeis, J.). See also *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938).

70. RESTATEMENT OF THE CONFLICT OF LAWS § 585 (1934).

71. See *Sedler*, *supra* note 8, at 51-52.

had been so treated in all other cases by the forum and by other courts.<sup>72</sup>

Some "classic" examples of the use of these "manipulative techniques" may be considered. For example, in *Mertz v. Mertz*,<sup>73</sup> New York spouses were involved in an accident in Connecticut. Connecticut allowed intra-family suits; New York did not. The New York court held that to allow the suit would be against its "public policy." In *Grant v. McAuliffe*,<sup>74</sup> a California plaintiff was injured in an accident in Arizona, in which the driver of the other automobile, also a California resident, was killed. The tort cause of action survived the death of the decedent under California law; it did not survive under Arizona law. The California court held that survival of actions was a matter of "procedure," to be determined by the law of the forum, and allowed the suit.<sup>75</sup> In *Kilberg v. Northeast Airlines*,<sup>76</sup> a New York resident was killed in an airplane crash in Massachusetts. Massachusetts law limited the amount of damages recoverable for wrongful death; New York law did not. The New York court held that this involved a matter of "procedure,"<sup>77</sup> and disregarding the principle that "public policy" cannot be used to defeat a defense existing under the law of the state that governs,<sup>78</sup> it held that to recognize the limitation would be against New York's "public policy." In all of these cases, the forum had a real interest in applying its own law and clearly would have done so under a policy-centered approach to choice of law. But confronted with the necessity of adhering to the place of the wrong rule, they deliberately "manipulated the system" to bring about what they considered to be a sound and just result.<sup>79</sup>

72. *Id.* 50-51.

73. 271 N.Y. 466, 3 N.E.2d 597 (1936).

74. 41 Cal. 2d 859, 264 P.2d 944 (1953).

75. That the court was employing "manipulative techniques" was subsequently acknowledged and justified by Justice Traynor, the writer of the opinion. As he stated:

It may not be amiss to add that although the opinion is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.

Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

76. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). See note 67 *supra*.

77. The court repudiated this finding the following year. See note 67 *supra*.

78. See note 69 & accompanying text *supra*.

79. See Sedler, *supra* note 8, at 50-53.

The Michigan Court of Appeals and the federal courts in Michigan, bound by the strictures of *Abendschein*, similarly have resorted to these "manipulative techniques" in order to bring about the application of Michigan law. In addition, they have tinkered with the Michigan borrowing statute in order to allow suit in Michigan by a Michigan plaintiff that was time-barred under the law of the state where the accident occurred. In *Branyan v. Alpena Flying Service*,<sup>80</sup> Michigan residents<sup>81</sup> flying in a chartered airplane owned and operated by a Michigan corporation, were killed when the airplane crashed in Virginia. Virginia law limited the amount of damages recoverable for wrongful death; Michigan law did not. The Michigan Court of Appeals, noting that the Michigan supreme court in *Abendschein* had excluded airplane accidents from the operation of the place of the wrong rule,<sup>82</sup> concluded that it would be against Michigan's "public policy" to limit the amount of damages recoverable for wrongful death.<sup>83</sup> It then proceeded to employ interest analysis, which in this case of false conflict led to the application of Michigan law. In *Tucker v. Norfolk and Western Railway Co.*,<sup>84</sup> two Michigan spouses were involved in an accident in Ohio. Michigan allowed intra-family suits; Ohio did not. Suit was brought in a federal district court in Michigan. Here the court had the advantage of a previous Michigan supreme court decision, *Kircher v. Kircher*,<sup>85</sup> which like the New York decision in *Mertz v. Mertz*,<sup>86</sup> had employed "public policy" to bar an intra-family suit between Michigan spouses at a time when Michigan recognized intra-family immunity. The district court, distinguishing *Abendschein* on the ground that the Michigan supreme court in that case found that no question of intra-family immunity was involved, concluded that the *Kircher* public policy analysis rather than the *Abend-*

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80. 65 Mich. App. 1, 236 N.W.2d 739 (1975).

81. Three of the four victims were Michigan residents.

82. 65 Mich. App. at 5, 236 N.W.2d at 742. In *Abendschein* the court said: "Bearing in constant mind that this case and its issue deals only with actions at law for damages arising out of motorcar (not airplane) accidents, and that no intra-family litigation is involved . . ." 382 Mich. at 519, 170 N.W.2d at 140.

83. It equated "public policy" with "substantive law" in the same manner as the New York court of appeals did in *Mertz* and *Kilberg*. This, of course, is not the meaning of "public policy" for conflicts purposes.

84. 403 F. Supp. 1372 (E.D. Mich. 1975).

85. 288 Mich. 669, 286 N.W. 120 (1939).

86. 271 N.Y. 466, 3 N.E.2d 597 (1936). See text at note 73 *supra*.



*schein* place of the wrong holding controlled the principle case.<sup>87</sup> Thus, since it was now against Michigan's "public policy" to refuse to allow a tort action between Michigan spouses, the claim against the defendant-spouse was permitted. The court, however, conveniently ignored the fact that it was rejecting a defense, as opposed to a claim, existing under the governing law, which was clearly improper under the principles of the traditional approach. As in *Branyan*, the court applied Michigan law in this case of false conflict. Its "good work" in this regard, however, was undone by the decision of the Michigan Court of Appeals in *Sweeney v. Sweeney*,<sup>88</sup> where a panel different than that which sat in *Branyan* distinguished *Branyan* on the ground that it presented no question as to the "existence of the cause of action,"<sup>89</sup> but only one as to the amount of damages recoverable. It also characterized the reference to intra-family immunity in *Abendschein* as "dicta," not justifying any departure from the place of the wrong rule in cases involving intra-family immunity.<sup>90</sup> It thus applied Ohio law to bar a suit between Michigan spouses. What really happened, of course, was that the judges who decided *Sweeney* were not willing to employ "manipulative techniques" to bring about the application of Michigan law, while the judges who decided *Branyan* and *Tucker* were. In *Papizzo v. O. Robertson Transport, Ltd.*,<sup>91</sup> a Michigan victim was killed in Ontario due to the negligence of an Ontario defendant. Under Michigan law recovery was allowed in a wrongful death action for various intangible interests, such as loss of companionship; under Ontario law it was not. Suit was brought in a federal court in Michigan. The court held that the elements of damages recoverable went to "procedure," to be determined by Michigan law as the law of the forum.<sup>92</sup> In so doing, it emphasized Michigan's interest in applying its law allowing greater recovery and the absence of

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87. 403 F. Supp. at 1373. As to the quoted language from *Abendschein*, see note 82 *supra*.

88. 71 Mich. App. 428, 248 N.W.2d 571 (1976), *appeal granted*, 399 Mich. 896 (1977).

89. *Id.* at 430, 248 N.W.2d at 572.

90. *Id.* at 429-30, 248 N.W.2d at 572.

91. 401 F. Supp. 540 (E.D. Mich. 1975).

92. It cited *Kilberg* in support of this conclusion, notwithstanding that this basis of *Kilberg* had been repudiated by the New York court of appeals the year after it was decided. See note 67 *supra*.

unfairness to the defendant in the application of Michigan law on this issue.<sup>93</sup>

In addition to devising "manipulative techniques," the Michigan Court of Appeals has been willing in some cases to use the Michigan borrowing statute in order to circumvent the time-barring effect of the law of the state where the injury occurred. In *Parish v. B. F. Goodrich Co.*,<sup>94</sup> the Michigan supreme court had occasion to interpret the Michigan borrowing statute,<sup>95</sup> which provides that a suit not barred by limitations under Michigan law may nevertheless be barred by the law of the "place where the claim accrued." In other words, the shorter statute of limitations of that state applies. Assuming that the term, "place where the claim accrued," is synonymous with "state whose substantive law the court is applying,"<sup>96</sup> so long as Michigan adheres to the place of the wrong rule, the "place where the claim accrued" within the meaning of the borrowing statute in accident cases is the state where the accident occurred. In *Parish* the court so held, and applied the shorter Ohio statute of limitations to bar the claim of Michigan plaintiffs who purchased a defective tire in Michigan that blew out in Ohio, causing an accident there.<sup>97</sup> Likewise, in *Long v. Pettinato*,<sup>98</sup> the Michigan supreme court held that the borrowing statute applied to accidents occurring in foreign countries, such as Canada, and applied the Ontario statute of limitations to bar a suit arising from an accident involving Michigan parties that occurred on the Canadian side

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93. 401 F. Supp. at 543.

94. 395 Mich. 271, 235 N.W.2d 570 (1975).

95. MICH. COMP. LAWS ANN. § 600.5861(2) (1968).

96. Some courts have interpreted these statutes literally without regard to whether the place "where the claim accrued" is also the state whose substantive law the court would be applying. See *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*, 372 F.2d 18 (3rd Cir. 1966), cert. denied, 387 U.S. 930 (1967). If the forum is applying the traditional approach to choice of law, the place "where the claim accrued" will be the state whose substantive law it is applying, since it is applying the law of the state where the "last act" necessary to the existence of liability occurred. If it has abandoned the traditional approach, however, this will not necessarily be so. Since the purpose of the borrowing statute is to bar suit at the forum if it is time-barred in the state whose substantive law the forum is applying, the place "where the claim accrued," should be interpreted to mean the state whose substantive law the forum is applying. See *Klondike Helicopters, Ltd. v. Fairchild-Hiller Corp.*, 334 F. Supp. 890, 894 (N.D. Ill. 1971), criticized on other grounds, 508 F.2d 603, 607 n.8 (1975).

97. It also held that the plaintiff could not avoid the bar of the borrowing statute by proceeding on a breach of warranty theory. 395 Mich. at 277, 235 N.W.2d at 572.

98. 394 Mich. 343, 230 N.W.2d 550 (1975).

of the Ambassador Bridge. Similarly, in cases such as *Pusquilian v. Cedar Point, Inc.*,<sup>99</sup> and *Shamie v. Shamie*,<sup>100</sup> the Michigan Court of Appeals applied the shorter statute to bar the claim of a Michigan plaintiff that was not time-barred under Michigan law. However, in *DeVito v. Blenc*,<sup>101</sup> where Michigan parties were involved in an accident in Ontario, the court grafted the tolling provisions of the Michigan statute of limitations onto the Ontario statute of limitations to hold that the Ontario statute had not run. This was a clear departure from the approach normally taken to tolling provisions; usually the forum's tolling provisions apply only to the forum's statute of limitations and the other state's tolling provisions apply to its statute.<sup>102</sup> The effect in *DeVito* was to allow a suit that would have been barred if brought in Ontario, a result clearly inconsistent with the express language of the borrowing statute.<sup>103</sup> In *Wilson v. Eubanks*,<sup>104</sup> where, again, Michigan parties were involved in an accident in Ontario and suit was barred by the Ontario statute of limitations, the court refused to allow the defendant to amend his answer to plead this defense. Its hostility toward applying Ontario law to bar the suit was reflected in its observation that "one who asserts the defense of a foreign statute of limitations to bar an action between residents of Michigan timely brought under Michigan law must cut square corners."<sup>105</sup>

In the ten cases involving conflicts torts questions that have arisen since *Abendschein*, then, four directly involving choice of law (*Branyan*, *Tucker*, *Sweeney*, and *Papizzo*), and six involving choice of law indirectly in the sense that the choice of law decision was subsumed in the decision with respect to the borrowing statute (*Pusquilian*, *Shamie*, *DeVito*, *Parish*, *Long*, and *Wilson*), a policy-centered approach to choice of law would have called for the application of Michigan law. In all of these cases Michigan had a real interest in applying its law on the point in issue, since the plaintiff was a resident of

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99. 41 Mich. App. 399, 200 N.W.2d 489 (1972).

100. 45 Mich. App. 384, 206 N.W.2d 463 (1973).

101. 47 Mich. App. 524, 209 N.W.2d 728 (1973).

102. See, e.g., *Conner v. Spencer*, 304 F.2d 485 (9th Cir. 1962); *Bowling v. S.S. Kresge Co.*, 431 S.W.2d 191 (Mo. 1968).

103. The statute provides: "The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, *whichever bars the claim.*" MICH. COMP. LAWS ANN. § 600.5861(2) (1968) (emphasis added).

104. 36 Mich. App. 287, 193 N.W.2d 353 (1971).

105. 36 Mich. App. at 293, 193 N.W.2d at 356.

Michigan, and in all but two cases (*Parish* and *Pasquilian*), the defendant was as well, and since the social and economic consequences of the accident would be felt in Michigan. Also, in all of these cases, as in the accident situation generally, the application of Michigan law would not have been fundamentally unfair to the other party. Moreover, the consistent application of the place of the wrong rule would have resulted in the displacement of Michigan law and the sacrifice of its real interests. Indeed, in eight of the ten cases, where both the plaintiff and the defendant were Michigan residents, the state of injury had no interest at all in applying its law to deny recovery, so that, as in *Abendschein*, the place of the wrong rule operated to defeat the interest of the only concerned state without advancing any interest of the state whose law was applied.

If adherence to the place of the wrong rule really did achieve "certainty, predictability and ease of application," it would do so at a terrible price: the sacrifice of Michigan's real interests in case after case involving Michigan parties simply because the accident occurred in another state.<sup>106</sup> In no sense have those objectives even remotely been achieved. Adherence to the place of the wrong rule has merely forced the Michigan Court of Appeals and the federal courts in Michigan—when they are disposed to do so—to resort to "manipulative techniques" and questionable interpretations of the borrowing statute. Choice of law in Michigan is in a shambles. It is impossible to predict when the Michigan Court of Appeals or the federal courts in Michigan will again decide to resort to "manipulative techniques," or when one panel of the court of appeals will refuse to follow the lead of another panel or of the federal courts in employing them. *Abendschein* truly has produced the worst of both worlds in Michigan. The results in conflicts torts cases are neither sound nor predictable. It is all one big mess.

#### IV. A RETROSPECTIVE VIEW: CHOICE OF LAW IN MICHIGAN UNDER A POLICY-CENTERED APPROACH

The choice of law shambles that now exists in Michigan is all the more tragic, since the conflicts torts cases that actually

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106. See the discussion concerning the sacrifice of the forum's real interests by the application of the rules of the traditional approach in B. CURRIE, *supra* note 22, at 100-01.

have arisen here and that are likely to arise in the future can be disposed of without much difficulty under a policy-centered approach. Conflicts torts cases tend to fall into certain fact-law patterns.<sup>107</sup> The analysis of the policies and interests of the involved states in the particular case can be related to the fact-law pattern presented there, and the decision can be applied directly or analogously to another case presenting the same or a similar fact-law pattern. In torts cases the fact part of the fact-law pattern relates to the states where the parties reside, the state where the harm occurred, and if it differs, the state where the act or omission causing the harm took place. The law part primarily relates to whether the law in question allows or denies recovery.<sup>108</sup> Thus, a case may present the fact-law pattern of (1) two parties from a recovery state involved in an accident in a non-recovery state, (2) two parties from a non-recovery state involved in an accident in a recovery state, and (3) parties from different states, one of which allows recovery and the other of which does not, involved in an accident in one or the other state. It is from these fact-law patterns that rules of choice of law emerge in conflicts torts cases.<sup>109</sup>

As discussed previously,<sup>110</sup> these rules of choice of law are based on the policies reflected in the laws of the involved states, and the interest of each state, in light of those policies, in having its law applied on the point in issue. In addition, whenever the forum recognizes a real interest in applying its own law in order to implement the policy reflected in that law, it is likely to do so, assuming that this will not be fun-

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107. See Sedler, *supra* note 32, at 980. It is possible to construct fact-law patterns in conflicts contracts cases as well. *Id.* 980, n.27. In conflicts contracts cases Michigan presumably follows the "place of making" rule, with the qualification that the law of the state where the contract was made does not apply if the contract was intended to be performed in another state. See *Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp.*, 401 F. Supp. 1102 (E.D. Mich. 1975). See also *Waldorf v. KMS Industries*, 25 Mich. App. 20, 181 N.W.2d 85 (1970). Decisions in conflicts contracts cases likewise can be made on the basis of considerations of policy and fairness to the parties. Courts in practice have had no difficulty applying a policy-centered approach to conflicts contracts cases. See Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COL. L. REV. 279, 302-15 (1972).

108. It also relates to whether the law in question reflects an admonitory or a compensatory policy or both, and whether it involves other considerations, such as those applicable to workmen's compensation.

109. Sedler, *supra* note 32, at 981.

110. See notes 27-47 & accompanying text *supra*.

damentally unfair to the other party.<sup>111</sup> Three rules of choice of law in the torts area that embody two of the interest solutions proposed under my reformulation of Currie's interest analysis methodology<sup>112</sup> cover *Abendschein* and all of the post-*Abendschein* cases that have arisen in Michigan.

The most "universal" rule of choice of law is that when two residents of the forum are involved in an accident in another state, the forum will apply its own law. This rule of choice of law embodies the interest solution that when the forum has a real interest in applying its own law, it should do so.<sup>113</sup> The application of this rule of choice of law in Michigan would cover *Branyan*, *Tucker*, *Sweeney*, *Papizzo*, *Shamie*, *DeVito* and *Wilson*. Another rule of choice of law is that when two parties from a recovery state, without regard to forum residence, are involved in an accident in a non-recovery state, recovery will be allowed.<sup>114</sup> This rule embodies the interest solution that when the forum does not have a real interest in applying its own law, but another state does have such an interest, it should apply the law of the other state. As pointed out previously,<sup>115</sup> this rule of choice of law covers *Abendschein*, since in the circumstances presented, both New York, the plaintiff's home state, and Michigan, the defendant's home state, would allow recovery, while Ontario, where the accident occurred, would not.

Only *Parish* and *Pusquilian* remain. In both of these cases the plaintiff was a Michigan resident, the defendant was a non-resident, and the accident occurred in another state. In *Parish*, the defendant was doing substantial business in Michigan and the product that caused the injury was purchased there. In *Pusquilian* the defendant advertised extensively in Michigan and drew a large number of its patrons from that state.<sup>116</sup> Both of these cases involved choice of law only indirectly in that the precise question before the court concern-

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111. See Sedler, *supra* note 14, at 233.

112. *Id.* 215.

113. See Sedler, *supra* note 32, at 1033.

114. *Id.* 1034.

115. See notes 50-56 & accompanying text *supra*.

116. The defendant's extensive advertising and solicitation of business in Michigan would provide sufficient "minimum contacts" for the exercise of *in personam* jurisdiction in Michigan over the claim of a Michigan resident arising from an accident at the defendant's amusement park in Ohio. The court's dismissal of the case on grounds of limitations made it unnecessary for it to consider the defendant's lack of jurisdiction contention.

ed the applicability of the state of injury's shorter statute of limitations to bar the suit. These cases can be reframed, however, to involve the choice of law question directly. Suppose that in these cases the defendant asserts the defense of contributory negligence, which is a complete bar under the law of the defendant's home state, where the injury occurred. Assume, on the other hand, that Michigan recognizes comparative negligence.<sup>117</sup> Michigan has a real interest in applying its law to allow recovery, since the social and economic consequences of the accident will be felt by the plaintiff in that state. The defendant's home state likewise has a real interest in applying its law in order to protect its resident defendant and insurer. In a situation such as this Michigan should advance its own real interests and apply its own law. No unfairness results, since accidents are not planned and since contributory negligence is not the kind of matter that involves any reliance on the law of a particular state.<sup>118</sup> The application of Michigan law under these circumstances is also called for by the interest solution that the forum should apply its own law whenever it has a real interest in doing so. This interest solution is reflected in the rule of choice of law followed by most of the courts that have passed on the question: when a recovery state plaintiff is injured by a non-recovery state defendant in the defendant's home state, and suit is brought in the plaintiff's home state, recovery is allowed.<sup>119</sup>

There are other fact-law patterns that may arise in Michigan. The courts, though, can find guidance for their resolution in these interest solutions and in the rules of choice of law that have been developed by other courts in the process of deciding actual cases. The policy-centered approach to choice of law does not produce a "quagmire of unanswered and perceivably unanswerable questions"—the fear of the Michigan supreme court in *Abendschein*. It requires only a realistic assessment of the policies and interests of the involved states and considerations of fairness to the parties.<sup>120</sup> The clear majority of courts in this country which adopted the policy-

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117. See *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977).

118. As compared with, for example, the standard of care owed a visitor on the land. See *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971).

119. See Sedler, *supra* note 32, at 1036.

120. As pointed out previously, fairness to the parties usually is not a problem in accident cases. See note 117 & accompanying text *supra*.

centered approach in the wake of their abandonment of the traditional approach have applied it effectively. It certainly can be applied effectively in Michigan as well. Its adoption would lead to sound and just results in the cases that come before the courts for decision and would extricate choice of law in Michigan from the shambles that now exists.

## V. A CONSTITUTIONAL INQUIRY

In light of the decision of the Michigan supreme court in *Manistee Bank & Trust Co. v. McGowan*,<sup>121</sup> invalidating the Michigan guest statute as violative of the equal protection clause of the Michigan Constitution,<sup>122</sup> continued adherence to the place of the wrong rule raises a serious constitutional question insofar as it results in the application of the law of the place of injury to deny recovery to a Michigan plaintiff injured by a Michigan defendant in another state.<sup>123</sup>

Currie contended that the fourteenth amendment's equal protection clause imposed limitations on a state's power to make choice of law decisions, designed to prevent unreasonable discrimination against forum residents or residents of other states.<sup>124</sup> In his view the forum would be discriminating unreasonably against its own residents by denying them the benefit of its own law solely on the ground that the case was connected with another state, such as when, following the place of the wrong rule, it would apply the law of the state of injury to deny recovery to a forum plaintiff injured by a forum defendant in another state. Since the forum would apply its own law in a purely domestic case, and since its interest in applying that law was the same when the accident occurred in another state, Currie maintained that the distinction between the application of the forum's law in favor of forum residents depending on where the accident occurred was unreasonable and violative of equal protection.<sup>125</sup> As

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121. 394 Mich. 655, 232 N.W.2d 636 (1975).

122. MICH. CONST. art. I, § 2.

123. This is the situation that was presented in eight out of the ten post-*Abendschein* cases.

124. See generally B. CURRIE, *supra* note 22, at 572-83. His views in this regard were originally set forth in an article co-authored by Professor Herma Hill Kay, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI L. REV. 1 (1960).

125. B. CURRIE, *supra* note 22, at 572-83.



discussed fully elsewhere,<sup>126</sup> however, to the extent the United States Supreme Court has been unwilling to find significant limitations on choice of law inhering in the due process and full faith and credit clauses, and, in fact, has not granted review in any case involving a constitutional challenge to choice of law in over a decade,<sup>127</sup> it is unlikely to find such limitations inhering in the equal protection clause or in other clauses of the Constitution either. Thus, it is doubtful that the Supreme Court would hold that it is violative of equal protection for a state court to continue to apply the place of the wrong rule, even if this results in discrimination against a forum resident solely because the accident occurred in another state.<sup>128</sup>

In *Manistee Bank & Trust Co. v. McGowan*, the Michigan supreme court, however, made it clear that the equal protection clause of the Michigan Constitution limits severely the power of the state to distinguish between identifiable classes of accident victims. Such a distinction is present, however, whenever the place of the wrong rule is applied to deny recovery under Michigan law to a Michigan plaintiff injured by a Michigan defendant in another state, since if the accident occurred in Michigan, Michigan law, allowing recovery, would apply. Moreover, the "certainty, predictability and ease of application" justification that the court advanced for the retention of the place of the wrong rule in *Abendschein* cannot withstand the "substantial relation to the object" standard that it promulgated for equal protection purposes in *Mainstee*. To the contrary, as we have seen, the application—or more accurately, misapplication—of the place of the wrong rule has made a shambles out of choice of law in Michigan. Even if the place of the wrong rule were being consistently applied, there would still be no reasonable basis for distinguishing between Michigan accident victims injured by the negligence of Michigan defendants in Michigan and in other states. In both of these instances the social and economic consequences of the

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126. Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 144-45 (1973).

127. The last time the Supreme Court considered a question of the constitutionality of a state court's choice of law decision was in *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964).

128. As a practical matter, it in all likelihood would refuse to grant review to consider the question.

accident are felt in Michigan, and in both of these instances Michigan law allows recovery; so long as Michigan continues to follow the place of the wrong rule, however, the right to recover under Michigan law depends on whether or not the accident occurred in Michigan. Since the place where the accident occurs bears no "substantial relation to the object" of Michigan's policy in allowing recovery to accident victims, the rationale of *Manistee* would indicate that the distinction between Michigan residents injured by Michigan residents in Michigan and those injured by Michigan residents in other states is violative of the equal protection clause of the Michigan Constitution.

If this analysis is correct, it follows that in a case involving Michigan parties, the lower courts are free to declare the application of the place of the wrong rule violative of the Michigan Constitution and to decide the case under Michigan law. More significantly perhaps, the possible unconstitutionality of continued adherence to the place of the wrong rule in its most frequent application in practice<sup>129</sup> should prompt the Michigan supreme court to resolve the question at the earliest opportunity.

## VI. CONCLUSION: A TIME TO CAST AWAY

In the years since *Abendschein* was decided, the clear majority of American state courts have abandoned the traditional approach to choice of law and have adopted a policy-centered approach in its stead. They have reached sound and just results in the cases coming before them by making choice of law decisions on the basis of considerations of policy and fairness to the parties. Their experience contrasts sharply with that of Michigan, where choice of law is in a shambles. It is now the season for change. It is time for Michigan to go modern. It is time for Michigan to adopt the policy-centered conflict of laws.

### *Addendum*

After this article was completed and going through the process of publication, two cases were decided, one by the Michigan supreme court, and one by the Michigan Court of

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129. Eight of the ten post-*Abendschein* cases have involved a Michigan plaintiff injured by a Michigan defendant in another state.

Appeals, in which review has been granted by the Michigan supreme court, which may portend change in the future.

In *Sweeney v. Sweeney*,<sup>130</sup> the Michigan supreme court, while refusing to abandon the place of the wrong rule, refused to reaffirm it either, and held that Michigan's "public policy" dictated that Michigan law apply on the issue of spousal immunity in an Ohio accident involving Michigan parties. Noting that *Sweeney* "provides an opportunity to reappraise our entire conflicts of law policy,"<sup>131</sup> the court also noted that there were "recognized perils in an overbroad approach,"<sup>132</sup> and concluded that, "We can reach a proper result in this case without revamping Michigan's entire law of conflicts."<sup>133</sup> It cited both *Kircher v. Kircher*,<sup>134</sup> and *Tucker v. Norfolk & Western Railway Co.*,<sup>135</sup> for the proposition that to apply Ohio law to deny recovery here would be against Michigan's "public policy,"<sup>136</sup> but seemingly took pains to make it clear that it was not using "public policy" as a "manipulative technique."<sup>137</sup> It stated:

The state of residence has a substantial interest in the parent-child legal relationship. Michigan's announced public policy is to permit a child "to maintain a lawsuit against his parent for injuries suffered as a result of the alleged ordinary negligence of the parent." That public policy should apply to Michigan residents suing in Michigan courts even though the alleged negligence occurred in Ohio.

Automatic application of the *lex loci delicti* in this daughter against father suit would frustrate an announced Michigan public policy. Whether the *lex loci delicti* should be applied in other situations is not decided here.<sup>138</sup>

The frank acknowledgement of Michigan's real interest in applying its law here makes it clear that the court was not saying that it would be against Michigan's "public policy" to allow assertion of a claim of spousal immunity. Rather, it was saying that Michigan would apply its own law on that issue whenever Michigan parties were involved in an accident in a

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130. 402 Mich. 234, 262 N.W.2d 625 (1978).

131. *Id.* at 239, 262 N.W.2d at 627.

132. *Id.*

133. *Id.*

134. 288 Mich. 669, 289 N.W. 120 (1939).

135. 403 F. Supp. 1372 (E.D. Mich. 1975).

136. 402 Mich. at 242, 262 N.W.2d at 638.

137. In my view, this is what was done in *Tucker*. See note 84 & accompanying text *supra*.

138. 402 Mich. at 242, 262 N.W.2d at 628.

spousal immunity state, because the policy reflected in Michigan's law would be advanced by such application.

As Brainerd Currie observed some years ago, "[w]hy not summon public policy from the reserves and place it in the front line where it belongs?"<sup>139</sup> Michigan's policy of allowing recovery to a child injured by the negligence of the parent is no different than Michigan's constitutionally-mandated policy of allowing a guest passenger to recover against a host driver for ordinary negligence or of allowing the beneficiaries of an accident victim to recover unlimited damages for wrongful death. Its policy with respect to recovery in tort cases is strongly implicated whenever both parties are Michigan residents as in *Sweeney*, and in the eight of the ten recent cases discussed in this article. That policy would be served by holding that Michigan law applies whenever Michigan parties are involved in an accident in another state. This rule of choice of law, which is followed by all of the states that have abandoned the traditional approach,<sup>140</sup> is all that the court need have adopted in *Sweeney*, and in accordance with judicial method and the common law tradition, it can decide cases presenting different fact-law patterns when and if those cases arise. It did not have to "revamp Michigan's entire law of conflicts" in *Sweeney*, but it could have rendered a holding that went beyond Michigan's "public policy" as to spousal immunity.

It will have another opportunity to do so when it decides *Szlinis v. Moulded Fiber Glass Cos.*,<sup>141</sup> In that case wrongful death actions were brought by the beneficiaries of Michigan residents who were drowned when the newly-purchased boat in which they were sailing sank in the waters of Lake Erie. The boat was purchased in Michigan, where the manufacturer did substantial business.<sup>142</sup> The suit was timely filed under Michigan law. It was conceded that the deaths could not have occurred in Michigan waters, and that they occurred in either Ohio or Ontario waters. Applying the

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139. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 88 (1963).

140. See the discussion in Sedler, *Rules of Choices-of-Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1033-34 (1977).

141. 80 Mich. App. 55, 263 N.W.2d 282 (1977), review granted May 3, 1978.

142. And so for these purposes the manufacturer should be considered a Michigan defendant. See *Pahmer v. Hertz Corp.*, 36 App. Div. 2d 252, 319 N.Y.S.2d 949 (1971).

Michigan borrowing statute and looking to Ohio and Ontario law to determine when their respective limitation periods started to run,<sup>143</sup> the court found that suit was barred by both the Ohio and Ontario statutes.

The plaintiffs argued that the application of the borrowing statute was violative of equal protection, because it discriminated between Michigan residents injured in Michigan and Michigan residents injured outside the state where the limitation periods frequently were shorter than those of Michigan. The court, without referring at all to *Manistee Bank & Trust Co. v. McGowan*,<sup>144</sup> found that the borrowing statute was constitutional because it "resolves many conflicts of laws questions," and thus concluded that, "It thus appears not only that the purpose of the statute is reasonable, but that there is a reasonable relation between its purpose and the unequal classes which it creates."<sup>145</sup> But *Manistee* requires that there be a "substantial relation" to the object, and it is difficult to see how the policy of the borrowing statute is "substantially advanced" by barring suits between Michigan parties, timely filed under Michigan law, on the sole ground that the accident occurred in another state.

*Szlinis* again points up the unsoundness of failing to apply Michigan law when Michigan parties are involved in an accident elsewhere—whether in the Ontario or Ohio waters of Lake Erie, or on the Canadian side of the Ambassador Bridge, or simply on a highway in Ohio. The social and economic consequences of the accident will be felt in Michigan in the same manner as if the accident occurred in Michigan, and it now may be time for the Michigan supreme court to face up to that reality. The fears about a "quagmire of unanswered and possibility unanswerable questions"<sup>146</sup> and "recognized perils in an overbroad approach,"<sup>147</sup> should be answered by the experience of the other courts that have abandoned the traditional approach in favor of a policy-centered conflict of law. It may be that the court will come to realize this when it decides *Szlinis*.

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143. Cf. *DeVito v. Blenc*, 47 Mich. App. 524, 209 N.W.2d 728 (1973), where the same court grafted the tolling provisions of the Michigan statute of limitations onto the Ontario statute of limitations to hold that the Ontario statute had not run.

144. 394 Mich. 655, 232 N.W.2d 636 (1975).

145. 80 Mich. App. at 67, 263 N.W.2d at 288.

146. *Abendschein v. Farrell*, 382 Mich. 510, 516, 170 N.W.2d 137, 139 (1969).

147. *Sweeney v. Sweeney*, 402 Mich. 234, 239, 262 N.W.2d 625, 627 (1978).